3-3-08

No. 07-735

In the Supreme Court of the United States

ALFRED D. HUGHES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that, under the express terms of their alleged contract with the United States, petitioners assumed the risk of future regulatory change that would prevent performance of the contract.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 498 F.3d 1334. The opinion of the Court of Federal Claims on liability (Pet. App. 16a-71a) is reported at 58 Fed. Cl. 291. The opinion of the Court of Federal Claims on damages (Pet. App. 72a-178a) is reported at 71 Fed. Cl. 284.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2007. The petition for a writ of certiorari was filed on November 27, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is one of the breach-of-contract cases that were filed after the enactment of the Financial Institutions

Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. See *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996) (*Winstar*). Of the approximately 122 *Winstar*-related cases that were originally filed, only approximately 19 remain pending, and most of those cases, like this one, have nearly completed the litigation process.

1. Petitioners are El Paso Holding Company (EPHC) and its president and majority shareholder, Alfred D. Hughes (Hughes). This case arises from EPHC's acquisition of El Paso Federal Savings and Loan (El Paso), a federally insured thrift. After EPHC, Hughes, and El Paso entered into a merger agreement, El Paso sought authorization to convert from mutual to stock ownership, and EPHC sought approval to acquire control of El Paso. EPHC proposed that it would purchase all of El Paso's common stock by contributing $11.5 million in cash and 14 properties that it would obtain from their owners in exchange for stock. EPHC subsequently amended its application to propose the sale of $10 million in Class A debt to two partnerships and $1.5 million in Class B debt to Hughes in his personal capacity. Among the forbearances, waivers, and approvals that EPHC sought was permission for the thrift, in calculating its capital for regulatory purposes, to amortize the supervisory goodwill arising from the purchase over a 25-year period. Pet. App. 2a-4a, 6a, 21a-22a.

In 1988, the Federal Home Loan Bank Board (FHLBB) conditionally approved El Paso's application to convert, authorized EPHC to acquire control of El Paso, and sent a letter to El Paso granting various forbearances, including the 25-year amortization of goodwill (Forbearance Letter). In a separate letter, the

FHLBB granted regulatory approval but conditioned the approval on compliance with all applicable federal regulations, which included a requirement that controlling shareholders enter into a capital maintenance agreement (Approval Letter). Pet. App. 4a, 14a.

In accordance with this approval, on May 27, 1988, the day of the closing, the Federal Saving and Loan Insurance Corporation (FSLIC) and EPHC executed the Regulatory Capital Maintenance Dividend Agreement (Dividend Agreement). EPHC agreed that:

> [I]n consideration of the FSLIC approving the acquisition of control of El Paso . . . [EPHC] will cause the Regulatory Capital of [the Resulting Institution] to be maintained at a level at or above the Regulatory Capital Requirement and as necessary, will infuse sufficient additional capital . . . to effect compliance with such requirement.

Pet. App. 5a (second set of brackets in orginial). The Dividend Agreement also provided that "[a]ll references to regulations of the [FHLBB] or the FSLIC used in this Agreement shall include any successor regulation thereto." *Ibid.* El Paso converted from mutual to stock ownership, and EPHC acquired the thrift and changed its name to El Paso Savings Association (EPSA). In an Agreement of Obligation, also executed on the day of the closing, Hughes promised EPSA that the contributed real estate would produce at least $1 million in annual cash flow and that Hughes would make up any shortfall. *Id.* at 4a-5a, 62a.

2. In August 1989, Congress enacted FIRREA to address widespread problems in the savings and loan industry. FIRREA created the Office of Thrift Supervision (OTS) and charged it with examining, supervising,

and regulating federally insured thrifts. 12 U.S.C. 1462a, 1463. FIRREA gave the Director of OTS the authority to appoint a conservator or receiver for any insured thrift if the Director determined, in the exercise of his discretion, that one or more bases for seizure of the thrift existed. 12 U.S.C. 1464(d)(2)(A), 1821(c)(5). FIRREA also imposed new capital requirements on thrifts and restricted their ability to count supervisory goodwill toward those capital requirements. FIRREA thus altered the term over which EPSA could amortize the goodwill generated by EPHC's acquisition of El Paso. EPSA became insolvent and unable to meet its capital requirements. In September 1990, OTS placed EPSA into receivership. Pet. App. 27a-28a.

3. On September 5, 1990, EPHC and Hughes filed a complaint in the Court of Federal Claims alleging that, by enacting FIRREA, the government had breached a contract promising petitioners that EPSA could count as regulatory capital the goodwill created by EPHC's acquisition of El Paso. Pet. App. 7a.

The trial court initially granted summary judgment in favor of petitioners on liability. Pet. App. 16a-71a. Petitioners argued (see *id.* at 31a), and the trial court agreed, that no single document constituted a contract regarding the FHLBB's grant of permission to amortize the goodwill over 25 years. Instead, the court concluded that a series of documents—including the Approval Letter, the Forbearance Letter, the Agreement of Obligation, and the Dividend Agreement—together encompassed a single, "overall contract" to which both petitioners were parties. *Id.* at 67a, 69a-70a; see *id.* at 11a.

Later, however, in conjunction with its determination of damages, the trial court reconsidered its liability decision. Pet. App. 72a-177a. Based upon intervening

Federal Circuit precedents, the court concluded that, under the language in the Dividend Agreement, EPHC had assumed the risk of a change in regulatory capital requirements. Accordingly, FIRREA did not constitute a breach of the agreement between the government and EPHC. *Id.* at 168a; see *id.* at 177a (dismissing EPHC's claims). Although the trial court reaffirmed its earlier conclusion that there was one "overarching contract" comprising numerous documents, the court nonetheless held that the Dividend Agreement, which contained the assumption of risk provision, was "separate" from the other documents constituting the contract. *Id.* at 175a. Because Hughes had not signed the Dividend Agreement, the trial court held that Hughes had not assumed the risk of regulatory change, and was entitled to compensation for breach of the overall contract. *Id.* at 176a-177a. The court awarded him $46.5 million. *Id.* at 177a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-15a. The court first considered and rejected EPHC's cross-appeal, holding that the trial court correctly determined that EPHC had assumed the risk of a change in the regulations governing regulatory capital. *Id.* at 8a-10a. The court explained that the Dividend Agreement stated that "[a]ll references to regulations of the Board or the FSLIC used in this Agreement shall include any successor regulation thereto, it being expressly understood that subsequent amendments to such regulations may be made and that such amendments may increase or decrease the Acquiror's obligation under this Agreement." *Id.* at 8a. The court observed that this language was identical to contractual language considered in *Admiral Financial Corp.* v. *United States*, 378 F.3d 1336, 1339 (Fed. Cir. 2004), and *Franklin Federal Savings Bank* v. *United*

States, 431 F.3d 1360, 1369 (Fed. Cir. 2005). The court noted that, in those cases, it had concluded that this language placed on the private party to the contract the risk that regulations might change and alter the terms of the agreement. Adhering to that precedent, the court held that EPHC had assumed the risk of regulatory change and therefore could not recover for breach of contract based on the enactment of FIRREA. Pet. App. 8a-10a.

In reaching that holding, the court rejected EPHC's attempt to distinguish *Admiral* and *Franklin* based on its contention that the goodwill forbearance was the only consideration provided by the government in this case. Pet. App. 9a-10a. EPHC argued that, if the government could retract the goodwill forbearance at any time, then its promise under the contract was "illusory." *Id.* at 9a. The court of appeals rejected that argument on two grounds. First, the court stated, under *Winstar*, a promise for a regulatory waiver until regulatory change occurs can be sufficient consideration to support a contract. *Id.* at 10a. Second, the court stressed, the goodwill forbearance was not the only consideration here. The Dividend Agreement expressly described regulatory approval of the transaction as the government's contribution, and that approval alone, the court concluded, was sufficient consideration. *Ibid.*

The court of appeals next addressed the government's appeal of the award of $46.5 million to Hughes. The court reversed the award on the ground that Hughes, like EPHC, had assumed the risk of regulatory change. Pet. App. 10a-15a. The court concluded that all of the transaction documents—including the Approval Letter, the Forbearance Letter, and the Dividend Agreement—were part of one overall contract. *Id.* at

15a. That conclusion, the court explained, was supported by the common subject matter of the documents, their numerous cross-references to one another, and the timing of their execution. *Id.* at 12a, 14a-15a & n.2. For example, the court noted, the Approval Letter required compliance with all relevant regulations, which in turn required execution of a capital maintenance agreement, such as the Dividend Agreement. *Id.* at 14a. The Dividend Agreement stated that it was in consideration for the government's approval of the acquisition, which was contained in the Approval Letter. *Ibid.* And the Approval Letter specifically authorized issuance of the Forbearance Letter, which in turn stated that it was issued in connection with the approval of the acquisition. *Id.* at 14a-15a. Because there was only one contract, the court concluded that, if Hughes was a party to that contract at all, he was subject to its risk-allocation term, and he therefore could not recover for breach of contract based on FIRREA. *Id.* at 15a.

ARGUMENT

The court of appeals correctly rejected petitioners' breach-of-contract claims based upon its interpretation of the asserted contract. Its ruling is consistent with this Court's decision in *Winstar* and does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Petitioners contend (Pet. 15-22) that the court of appeals "misread" *Winstar* and "applied errant principles of contract law" when it interpreted the alleged contract to contain a government promise of goodwill forbearance with the risk of regulatory change on petitioners. Pet. 15. That contention is incorrect and does not warrant this Court's review.

Petitioners argue (Pet. 15-19) that the court of appeals' interpretation renders the government's consideration "illusory," and that the court's opinion therefore conflicts with Justice Scalia's concurring opinion in *Winstar* and the contract law on illusory promises on which he relied. That argument, however, rests on the mistaken premise that the promise of goodwill forbearance was the only consideration provided by the government. See Pet. 18. Contrary to that premise, the court of appeals held that regulatory approval of the acquisition was additional consideration provided by the government. See Pet. App. 10a. Indeed, as the court of appeals noted (*ibid.*), the Dividend Agreement expressly stated that EPHC's promise to maintain capital levels was made "in consideration of the FSLIC approving the acquisition of control of El Paso." *Id.* at 5a. The court of appeals also correctly held that regulatory approval was adequate consideration to support the alleged contract. See *id.* at 10a. Because there was ample consideration independent of the promise of goodwill forbearance, there is no conflict with Justice Scalia's concurring opinion or contract law principles concerning illusory consideration. See, *e.g.*, 1 E. Allan Farnsworth, *Farnsworth on Contracts* § 2.13, at 133 n.1 (3d ed. 2004) (explaining that an illusory promise only prevents the existence of a contract when "there is no consideration other than the promise in question to support the other party's promise").[1]

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[1] In holding that regulatory approval provided adequate consideration, the court of appeals necessarily reversed the trial court's finding that goodwill forbearance was the only consideration provided (Pet. App. 128a) and its related determination that, "absent the goodwill forbearance, all [petitioners] received was a multi-million dollar debt that was not bargained-for and was not worth a peppercorn" (*id.* at 131a-

Petitioners dispute (Pet. 20-21) the court of appeals' conclusion that regulatory approval was sufficient consideration, but that fact-bound disagreement does not warrant this Court's review. In any event, the court of appeals was correct. Petitioners minimize the value of regulatory approval by mischaracterizing the nature of the acquisition. Petitioners obtained control of a valuable thrift franchise by providing it with debt-encumbered properties. As a result, petitioners were able to retain control of those assets while using the thrift's funds to resolve the debts. Indeed, the thrift paid off debts for which petitioner Hughes was personally liable. Pet. App. 21a, 118a, 126a. Regulatory approval thus provided petitioners a valuable benefit.

Petitioners also ignore the fact that the goodwill forbearance was only one of several that the government granted in connection with the approval. Pet. App. 83a. The government also granted a forbearance terminating the supervisory agreement that previously had constrained El Paso's operations. *Id.* at 85a. That forbearance, fully performed at the time the acquisition was completed, provided consideration even in the face of the risk-allocation language of the Dividend Agreement. Another forbearance addressed potential failures by EPSA to meet regulatory net worth requirements due to "an increase in the contingency factor attributable to El Paso" on the acquisition date. *Id.* at 84a. EPSA was also permitted to "exclude all investments currently in El Paso's portfolio in determining the amount available for equity risk investments." *Ibid.* Further, EPSA was

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132a), on which petitioners rely (Pet. 18-19). As discussed in the text following this footnote, the disagreement between the trial court and the court of appeals on this fact-specific issue does not warrant this Court's review.

allowed to reduce its liquidity requirement below the amount required by regulation. *Id.* at 85a. In light of the additional forbearances associated with the regulatory approval, there can be no doubt that the approval was sufficient consideration for any contract that existed.[2]

Petitioners erroneously suggest (Pet. 21) that the court's holding that regulatory approval constituted adequate consideration conflicts with *D&N Bank* v. *United States*, 331 F.3d 1374 (Fed. Cir. 2003). Contrary to that suggestion, *D&N Bank* does not hold that regulatory approval cannot constitute consideration; rather, it holds that regulatory approval alone does not manifest the *intent to contract* necessary to establish a contract. *Id.* at 1378. Neither court below held that regulatory approval established the government's intent to contract here. Instead, the trial court found that various written documents, including the Forbearance Letter, manifested the intent to contract, Pet. App. 38a, and the court of appeals did not disturb that finding.

Finally, even if petitioners were correct that there was inadequate consideration under the court of appeals'

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[2] To support their claim that the "goodwill forbearance at issue in this case was the *only consideration* contributed by the government" (Pet. 18), petitioners cite trial testimony of former government employees. According to petitioners, those employees testified, many years after the transaction, that they were not "aware" "of any other obligation that the United States government was contractually required to perform." *Ibid.* That testimony, based upon the employees' personal memory, cannot undermine the court of appeals' holding that regulatory approval constituted additional and sufficient consideration— a holding that is amply supported by the express terms of the Dividend Agreement, which stated that regulatory approval was the consideration, and the Forbearance Letter, which detailed the numerous other forbearances provided by the government.

interpretation, their claim would not warrant review. If there was inadequate consideration, then there was no contract at all, and petitioners would still not be entitled to any relief. See *Caroline Hunt Trust Estate* v. *United States*, 470 F.3d 1044, 1049 (Fed. Cir. 2006) (no contract absent consideration). Because petitioners would not be entitled to relief even if their illusory-consideration contention were correct, it does not warrant this Court's review.[3]

2. a. Petitioners also incorrectly argue (Pet. 19-20, 27-30) that the court of appeals' decision conflicts with the *Winstar* plurality opinion. In fact, the *Winstar* plurality opinion affirmatively supports the decision of the court of appeals.

Petitioners erroneously contend (Pet. 19-20, 27-30) that the *Winstar* plurality rejected the possibility that a contract could promise goodwill forbearance only until regulatory change occurs. Contrary to that contention, the *Winstar* plurality explicitly acknowledged that a contract could expressly allocate to one of the parties the risk of regulatory change. Indeed, the plurality no-

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[3] Indeed, as the government argued below (see Gov't C.A. Br. 14 & n.2, reproduced at Pet. App. 178a), there was no contract regarding the treatment of goodwill in this case regardless of the consideration issue, because the government acted solely in a regulatory capacity when it approved EPHC's acquisition of EPSA without any assistance agreement. In *Winstar*, by contrast, there were admitted contracts (assistance agreements) with integration clauses that were held to incorporate regulatory resolutions and forbearances. See 518 U.S. at 862-865, 867. Moreover, as the government also argued below, Hughes was not a party to any contract on goodwill forbearance but instead participated in the transaction solely as an EPHC shareholder. See Gov't C.A. Br. 15-21. These arguments furnish additional grounds in support of the judgment below and additional reasons for the Court to deny review.

ted that contracts allocating that risk "are especially appropriate in the world of regulated industries, where the risk that legal change will prevent the bargained-for performance is always lurking in the shadows." *Winstar*, 518 U.S. at 869. Moreover, the plurality stated that, in the cases before it, "each side could have eliminated any serious contest about the correctness of their interpretive positions by using clearer language." *Id.* at 869 n.15. In support of that statement, the plurality cited *Guaranty Financial Services, Inc.* v. *Ryan*, 928 F.2d 994 (11th Cir. 1991) (*Guaranty*). The *Winstar* plurality noted that *Guaranty* had held, "based on very different contract language [from the language in the cases before the Court in *Winstar*], that the Government had expressly reserved the right to change the capital requirements without any responsibility to the acquiring thrift." *Winstar*, 518 U.S. at 869 n.15; see *Guaranty*, 928 F.2d at 999-1000. By citing *Guaranty* with approval, the *Winstar* plurality indicated that parties contracting with the government can expressly agree to accept the risk of regulatory change and thereby contract for a temporary regulatory forbearance. That is precisely what the court of appeals held that petitioners did here.

The *Winstar* plurality's approving citation of *Guaranty* also supports the court of appeals' holding in this case that language in the Dividend Agreement assigned the risk of regulatory change to petitioners. As both the trial court and the court of appeals noted, the Dividend Agreement's risk-allocation language is identical to language that the court of appeals, in *Admiral* and *Franklin*, construed to assign the risk of regulatory change to the private parties contracting with the government. Pet. App. 10a, 167a-168a. The language is likewise "identical" to the language that the Eleventh Circuit in-

terpreted the same way in *Guaranty*. See *Admiral*, 378 F.3d at 1339, 1343; *Franklin*, 431 F.3d at 1368-1371. Because the *Winstar* plurality cited *Guaranty*'s identical interpretation of identical language with approval, the *Winstar* plurality opinion supports the court of appeals' interpretation of the risk-allocation language at issue here.[4]

b. Petitioners further contend (Pet. 25-27) that the court of appeals' construction of the risk-allocation language is inconsistent with the court of appeals' decision that was affirmed in *Winstar*. As the court of appeals explained in *Franklin*, however, there is no conflict. The language at issue in this case and in *Franklin*, *Admiral*, and *Guaranty* is "quite different" from any language in the contracts at issue in *Winstar*. See *Franklin*, 431 F.3d at 1370; see also *Winstar*, 518 U.S. at 869 n.15 (plurality opinion).

3. Petitioners also argue that the court of appeals erred because it purportedly "construed a provision in the Approval Letter requiring petitioners' compliance with all applicable regulations as an open door through

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[4] Petitioners assert (Pet. 29 n.10) that, in citing *Guaranty*, the *Winstar* plurality did not address what language qualifies as clear enough to shift the risk of regulatory change to a private party. Contrary to that assertion, the plurality explicitly referred to the language that the Eleventh Circuit interpreted in *Guaranty* and stressed that the language differed significantly from the language in the cases before the Court in *Winstar*. See 518 U.S. at 869 n.15. Petitioners also assert that the *Winstar* plurality did not address "whether clear language could shift the risk of regulatory change to a private party when the result eliminated the only consideration provided by the government." Pet. 29 n.10. Even assuming that assertion is correct, it is irrelevant here. The risk-allocation language in petitioners' alleged contract did not eliminate the regulatory approval, which the court of appeals held was adequate consideration.

which virtually any regulatory requirement could be added to an already finalized agreement and trump its core provisions." Pet. 22-23. Even if petitioners' contention were correct, their fact-bound challenge to the court's construction of this particular contract would not warrant review—especially considering the dwindling number of *Winstar*-related cases.

In any event, petitioners' contention is not correct but is premised on a mischaracterization of the court of appeals' opinion. The court did not impose any obligations on petitioners based on the language in the Approval Letter requiring compliance with all relevant regulatory provisions. Instead, the court relied on that language as one factor among many in concluding that all of the documents concerning the El Paso acquisition were part of a single contract. See Pet. App. 14a. Moreover, the risk-allocation provision in the Dividend Agreement was not a "regulatory requirement" (Pet. 23) but a voluntary promise by petitioner to accept the risk of regulatory change. And the risk-allocation provision was not "added to an already existing agreement." *Ibid.* Both the trial court and the court of appeals held that the Dividend Agreement was part of the alleged overall contract. Pet. App. 14a-15a, 69a-70a. And the court of appeals found that the parties entered into that contract on the day that EPHC executed the Dividend Agreement, which was the same day that the acquisition closed and Hughes signed the Agreement of Obligation. *Id.* at 14a n.2. Finally, the risk-allocation provision did not "trump" the "core provisions" of the contract. Pet. 23. Petitioners' assertion that it did is based on the mistaken premise that it "eliminated the government's obligation to provide the contracted-for consideration." *Ibid.* As discussed above, the court appeals held that

there was ample additional consideration provided by the government, most notably approval of the El Paso acquisition. Far from "trump[ing]" the "core provisions" of the contract, the risk-allocation language was an integral part of the bargain allegedly struck between petitioners and the government.

Petitioner Hughes and the other shareholders in EPHC were highly experienced business people, represented by experienced counsel. Had petitioners objected to the risk-allocation provision, they could have walked away from the proposed transaction without any obligation to the government. Having elected to proceed with the acquisition upon the terms proposed by the government, they cannot now demand that the Court rewrite the risk-allocation provision to which they expressly agreed.

4. Petitioners additionally argue (Pet. 23-24) that the court of appeals erred in concluding that Hughes was bound by the risk-allocation provision, and they suggest that the Dividend Agreement was somehow a separate contract from the agreement on goodwill forbearance. That fact-bound contention does not warrant this Court's review.

As an initial matter, petitioners' argument is inconsistent with their position in the trial court, where they asserted that there was *one* contract that consisted of EPHC's application to acquire EPSA, FHLBB's letter approving the acquisition, the Forbearance Letter, and the Dividend Agreement. See Pet. App. 31a. The trial court agreed with petitioners' view. *Id.* at 39a, 67a, 69a-70a; see *id.* at 11a. The court of appeals likewise determined that "the series of contractual documents in this case constitute one overall agreement." *Id.* at 15a. There is no reason for this Court to revisit that fact-spe-

cific decision. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

5. Finally, petitioners contend (Pet. 2-3, 30-34) that this Court's review is warranted because the Federal Circuit's decisions in the *Winstar* cases have undermined this Court's *Winstar* decision and will discourage citizens from entering into commercial contracts with the government. That contention is incorrect.

As the Federal Circuit has correctly observed, *Winstar* claims frequently turn on their particular facts and circumstances, and each case must be considered on its individual merits. See, *e.g.*, *California Fed. Bank, FSB* v. *United States*, 245 F.3d 1342, 1347 (2001), cert. denied, 534 U.S. 1113 (2002). Contrary to petitioners' implication (Pet. 31), some plaintiffs have been successful, while others have not. Cumulatively to date, plaintiffs in *Winstar*-related cases have been awarded over $1 billion, and the awards in individual cases have ranged from $2.05 million to $381 million. See *Hometown Fin., Inc.* v. *United States*, 409 F.3d 1360, 1362 (Fed. Cir. 2005); *Glendale Fed. Bank, FSB* v. *United States*, 378 F.3d 1308, 1312 (Fed. Cir. 2004), cert. denied, 544 U.S. 904 (2005).

In this case, as in *Franklin* and *Admiral*, petitioners were unable to make out their claim for breach of contract because they agreed to bear the risk of regulatory change. In other cases, relief has been denied based on findings that there was no contract, no standing, forfeiture for fraud, or a prior material breach. See *Long Island Sav. Bank, FSB* v. *United States*, 503 F.3d 1234, 1251, 1253 (Fed. Cir. 2007); *Anderson* v. *United States*, 344 F.3d 1343, 1359 (Fed. Cir. 2003); *D&N Bank*, 331

F.3d at 1382; *Castle* v. *United States*, 301 F.3d 1328, 1337 (Fed. Cir. 2002), cert. denied, 539 U.S. 925 (2003).

The Federal Circuit's decisions have not "marginalized" *Winstar* to benefit the government over private parties (Pet. 1), or, "by small bites, eclipsed *Winstar*" (Pet. 31), as petitioners contend. Rather, they have respected this Court's admonition that ordinary principles of contract construction and breach should be applied to government contracts. *Winstar*, 518 U.S. at 870-871, 895 (plurality opinion). Contrary to petitioners' apparent belief, the decision in *Winstar* did not command the Federal Circuit to issue a blank check to anyone who acquired a savings and loan during the 1980s.

In any event, the *Winstar* set of cases is nearing its end. Of the original 122 *Winstar*-related cases, only 19 remain, and none of the remaining cases concerns risk-allocation provisions. The issues raised by petitioners will thus have little, if any, future impact.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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